

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13

OLSTEN HEALTH SERVICES, A DIVISION OF OLSTEN CORPORATION<sup>1</sup>

Employer

and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 880, AFL-CIO

Petitioner

Case 13-RC-20197

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record<sup>2</sup> in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.<sup>3</sup>

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>4</sup>

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:<sup>5</sup>

All full-time and regular part-time homemakers who have worked an average of 6 hours per week during the 13 weeks preceding August 17, 1999, and who were on the Employer's active roster as of August 13, 1999, including RNs, CNAs, and HHAs, employed by the Employer at its Oak Park, Illinois branch with offices currently located at 1011 Lake Street, Oak Park, Illinois; 310 South Peoria Street, Chicago, Illinois; and 288 Barney Drive, Joliet, Illinois; and excluding clerical employees, all other employees, guards, and supervisors as defined by the Act.

**DIRECTION OF ELECTION\***

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which

commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Service Employees International Union, Local 880, AFL-CIO

#### LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of the full names voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the full names and addresses of all of the eligible voters, shall be filed by the Employer with the undersigned Regional Director who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in **Suite 800, 200 West Adams Street, Chicago, Illinois 60606** on or before **September 30, 1999**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

#### RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by October 7, 1999.

**DATED** September 23, 1999 at Chicago, Illinois.

/s/ Elizabeth Kinney  
Regional Director, Region 13

- \*/ The National Labor Relations Board provides the following rule with respect to the posting of election notices:
- (a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Director in the mail. In all cases, the notices shall remain posted until the end of the election.
  - (b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.
  - (c) A party shall be estopped from objection to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Director at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

1/ The names of the parties appear as amended at the hearing.

2/ The arguments advanced by the parties at the hearing and in the briefs have been carefully considered. The Petitioner moved to enforce the *subpoenas duces tecum* issued to the Employer prior to the opening of the hearing. I find, however, that record is complete and sufficient such that the additional documents are unnecessary to resolve the issue presented. Accordingly, the Petitioner's motion is denied.

3/ The Employer in its brief contends that the hearing officer committed reversible error when he denied its request for the production of union contracts. The Employer's request for production of these contracts was made with regard to its cross-examination of the Petitioner's witness concerning union contracts with other employers and the 73 percent allocation of funds (discussed *infra*) that the Employer is required to make towards direct worker costs. Contrary to the Employer, it is the opinion of the undersigned that the hearing officer did not commit reversible error in his rulings as terms of contracts applicable to employees of other employers is not relevant to the issue raised herein.

4/ The Employer is a corporation engaged in the business of providing home care to elderly individuals. In the past calendar year, a representative period, the Employer derived gross revenues in excess of \$500,000. During the same period, the Employer derived gross revenues in excess of \$50,000 from the sale or performance of its services to customers located outside the state of Illinois.

5/ The Petitioner seeks to represent a unit of all full time and regular part time homemakers. The parties stipulated to the appropriateness of the unit as well as the eligibility formula. While the stipulated unit includes registered nurses working as homemakers, it is clear from the record that they perform non-skilled, non-medical functions when working for the Employer as homemakers, and they do not perform any professional functions, such as administering medications. Accordingly, the stipulated unit raises no issues under *Sonotone Corp.*, 90 NLRB 1236 (1950).

The Petitioner urges a mail ballot election given the variety of hours and locations which the employees work. This issue is an administrative matter left to the undersigned's discretion after the direction of an election. The Board has held that a Regional Director has broad discretion in arranging the details of an election including determining whether a mail ballot election is necessary. *Harold F. Gross d/b/a Southwestern Michigan Broadcasting Company*, 94 NLRB 30, 31 (1951); see also, *Halliburton Services*, 265 NLRB 1154 (1982). Accordingly, I need not make a determination of that issue herein.

Thus, the only issue to be resolved is whether the homemakers constitute employees under the Act or whether they are excluded from the jurisdiction of the Act as independent contractors. The Employer contends that by virtue of its contract with the state, the homemakers are independent contractors, while the Petitioner argues that they are employees under the Act.

### **Facts**

The Employer participates in a Community Care Program funded by the state of Illinois. The program offers in-home care to residents of Illinois who are 62 years or older, have less than \$10,000 in assets, and are determined to be frail and in need of care. The state's Department on Aging ("department") administers the program and determines whether a client meets the eligibility requirements. The department gives referrals of clients to the Employer. A case manager with the department determines the client's "plan of care" which sets

forth the specific tasks and duties the homemaker or caregiver is to do. The client and the department execute a client agreement setting forth the plan of care, number of hours, type of service, etc.

The Employer and the department also have a contract in effect which provides that, *inter alia*, the Employer will comply with state regulations, conduct training, allow audits of caregiver and client files and adhere to the plan of care. The Employer is responsible for compliance with the plan of care. The Employer obtained this business through a competitive bidding process.

The state pays the Employer \$10.30/hour. Depending on the circumstances, the state may pay the entire sum or the client may contribute a co-payment. If it is a co-payment situation, the Employer sends a bill to the client. In those circumstances, if the client does not pay, neither the state nor the homemaker is liable for the shortfall. Of the money received, the Employer must allocate a minimum of 73% to direct worker costs and the remainder goes towards administrative costs. Of the remainder, the Employer determines how those funds will be distributed which may include the payment of additional wages to homemakers.

In the past year, the Employer maintained over 1000 homemakers on its active list and 700 have been assigned out in the last quarter. The Employer provides its services in the Chicago metropolitan area, including some western suburbs and in Joliet. The homemakers undergo an application process, including a background check and drug screen conducted by the Employer. The application form was prepared by the Employer's corporate office. The Employer verifies the applicants' qualifications and references and one of its recruiters will review the application. Once hired, the employee submits a W-4 form to the Employer. A new hire must complete state-required pre-service training given by the Employer. Employees also undergo five to six hours of in-service training per quarter. The in-service training is also mandated and may be designed by the Employer, the state or by other vendors. The materials used are at the Employer's discretion.

Homemakers' hours vary and the average range is between 4 and 40-50 hours per week. The client agreement does not specify particular hours but the client indicates when they wish to have the services performed. The Employer runs its operation on a 24-hour, 7 day-a-week basis although, typically, the clients prefer care during daytime hours. The Employer maintains a list of available clients with the number of hours required and plan of care. The homemakers usually choose cases within the area nearest their home. One of the Employer's supervisors will call the client to let him or her know that a homemaker will be coming to their home. Homemakers may have multiple assignments and may refuse assignments without adverse consequences. They may also accept employment with outside employers. A client, case manager or the department may request a particular homemaker, but the record shows that such instances are infrequent. The department may also require the Employer to hire a client's existing caregiver.

As mentioned, the case manager from the department formulates the client's plan of care which the homemaker executes. The plan may include duties, such as light housekeeping, bathing, toileting, errands, companionship and meal preparation. The case manager determines what services are necessary, the frequency and how many hours of care should be given. State regulations require the homemakers to follow the plan of care and to maintain records of daily activities. The Employer conducts the state-required quarterly and annual monitoring of service. A homemaker supervisor audits compliance with the plan of care by talking with the client. The homemakers' pay is not affected by these evaluations. If, however, homemakers miss a review, they cannot care for the client. The homemakers record their daily hours on a service calendar and return the forms to the Employer once a week by mail or by dropping them off at a lockbox located at various currency exchanges. The service calendar is a state-mandated form which is used to bill the state and to pay the homemaker.

Homemakers' pay ranges from \$5.25 to \$7 per hour depending on the services and Registered Nurses receive an extra 10 cents per hour to start. Homemakers also receive overtime for work exceeding 40 hours in one week and may receive bonuses for extra hours worked. Wage increases are individually negotiated between the homemaker and the Employer. The Employer deducts applicable taxes from employee paychecks and issues W-2 forms. The Employer's centralized billing facility in Kansas handles the payroll. Homemakers are also eligible for unemployment and workers compensation. The Employer does not provide health insurance. Homemakers do receive one week of vacation for 1000 hours worked in one year.

The Employer issues its employee handbook to homemakers. No state requirement governs the choice of manual used and the Employer's is not specific to the Community Care Program. The Employer does not discipline homemakers for tardiness and does not know of such instances unless a client calls. In cases of poor performance, a homemaker may be taken off a case if the client or state requests such action and the homemaker may be given a different case. The state can mandate the termination of a homemaker. If there is a suspicion of fraud, the Employer will talk to the homemaker and will report it to the state which conducts the investigation.

### **Analysis**

The only issue presented in this case is whether the homemakers are employees under the Act, as the Petitioner argues, or whether, as the Employer contends, they are independent contractors. Section 2(3) of the Act excludes from the definition of "employee" any individual who is an independent contractor. The Act does not define the term "independent contractor." Accordingly, the Board applies general agency principles. The major principle used is the common law of agency right-to-control test. *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968). Under this test, an employer-employee relationship exists when the Employer retains the right to control the ends to be achieved, as well as the means to achieve such ends.

The Employer argues that this case is one of first impression, but is closest to the facts of *Cardinal McCloskey Services*, 298 NLRB 434 (1992) and is distinguishable from *People Care, Inc.*, 311 NLRB 1075 (1993) upon which the Petitioner relies. The Employer essentially contends that state regulations are such that the Employer does not retain the requisite control over the manner and means of the homemakers' work. Contrary to the Employer, I find that the state regulations do not strip the Employer of its right to control the homemakers' work to the extent that they constitute independent contractors. Moreover, while each case is judged on its own facts, the instant case is more similar to *People Care* than to *Cardinal McCloskey*.

Like the employer in *People Care*, the Employer here enjoys significant control over the employees' terms and conditions of employment. First, the Employer determines the wages paid to employees. While the state regulations requiring that 73% of monies paid by the state be spent on direct homemaker costs create a certain constraint, the Employer is not completely handcuffed by that figure. Indeed the very fact that the Employer has a range of hourly wages demonstrates its flexibility. According to the state regulations, the 73% figure may be used for a number of benefits including some not provided by the Employer, such as health and life insurance, uniforms, travel reimbursement and travel time. 89 Ill. Admin. Code Sec. 240.2050. Further, the record shows that the Employer negotiates wage increases with homemakers. In contrast, the day-care providers in *Cardinal McCloskey* received a flat stipend per child which was set by regulation. The Employer here also grants certain benefits to homemakers such as vacations and bonuses for extra hours worked. It is noteworthy that, in processing the payroll, the Employer withholds taxes from homemakers' paychecks.

Next, the Employer controls the hiring process. It created the application form and its recruiter reviews the applications. The Employer also conducts the background checks and drug testing. While the state places limits on the process in terms of setting forth certain qualifications, the Employer determines which qualified applicants it will hire. The Employer then conducts the pre-service and in-service training of employees. Further, the Employer prepared the personnel manual issued to homemakers.

Certainly the state places some constraints on the way employees perform their work. Like *People Care*, the state formulates the plan of care and requires periodic evaluations. The Employer is then responsible for the execution of the plan of care and the audits. Its supervisors ensure that the plans are being followed. It is true that supervision here does not occur in the traditional sense of overseeing performance on a daily basis, but the homemaker supervisors are responsible for ensuring that the plan of care is executed by the homemaker as required.

One difference between the instant case and *People Care* is that here, there is no evidence that either the Employer or the state issues discipline to the employees.<sup>1</sup> The Employer does, however, report suspicions of fraud to the state after talking to the homemaker. While discipline is an important factor, I find that, in light of the other facts present in the case, it alone is not dispositive.

Furthermore, similar to the aides in *People Care*, the homemakers are not akin to entrepreneurs. The homemakers never work from their own homes and are not required to purchase equipment, supplies or a uniform. The Employer supplies them with surgical gloves and the balance of supplies come from the client. The homemakers do incur travel expenses but, as noted in *People Care*, many employees pay to travel to and from the workplace. However, in *Cardinal McCloskey*, supra at 436, the Board noted that everything from compensation to equipment came from the state, either directly or indirectly, and that the employers functioned merely as conduits.

Based on the facts described above, I find that the Employer possesses significant control over the hiring, wages, benefits, work rules, and supervision. Accordingly, I find that the homemakers in the instant case are employees under the Act inasmuch as the state regulations under which the Employer operates, while considerable, do not divest the Employer of control over the homemakers' terms and conditions of employment to the extent that they constitute independent contractors.

177-2414-2200; 177-2414-6600

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<sup>1</sup> Although stating that the Employer is responsible for ensuring that the plan of care is carried out, the Employer's Branch Director testified that even in instances where the plan is not followed, the homemaker suffers no adverse consequences, as long as the client signs off on the appropriate paperwork. Indeed, from the testimony of this witness, it would appear that the homemakers work virtually unfettered and free from the specter of any discipline. This testimony appears to be at odds with the Employer's contractual obligation to ensure compliance with the plan of care.